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Supreme Court, U.S.
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No. 08-1546

In the

Supreme Court of the United States

KENNETH C. KEENER,
WILLIAM P. SMITH, and ANNE D. SMITH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. Status of Related Litigation

After the petition for writ of *certiorari* was filed in this matter, the Federal Circuit denied the Government's motion for summary affirmance in related cases based on *Keener*[1] and selected two of those appeals as representative cases for briefing regarding issues similar to those here and other unrelated issues – *Prati v. U.S.* (Fed.Cir. #2008-5117) and *Deegan v. U.S.* (Fed.Cir. #2008-5129). Appellants' opening briefs have been filed in both cases. Appellee's brief are pending.

2. Section 6621(c) Penalty Interest

In contrast to the Government's reliance on a "Blue Book" assertion that §6621(c) was enacted to discourage the proliferation of abusive tax shelters, direct legislative history specifically states §6621(c) and other accuracy-related penalties (*e.g.* §6659 valuation overstatement) were enacted as tools to encourage settlement in order to manage the Tax Court's docket. Congress pointedly reminded the IRS that its settlement policy should be fair and flexible and only appropriate cases should be litigated.[2] The IRS's own litigation guidelines consistently advise that the specter of §6621(c) should be used to encourage settlement.[3] In *Law*, an early §6621(c) case, Tax Court Judge Whitaker recognized the "*in terrorem*" intent to encourage settlement would not be served by allowing the government to impose

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1 *Keener v. U.S.*, 551 F.3d 1358 (Fed.Cir. 2009).

2 See *Todd v. C.I.R.*, 862 F.2d 540, 544 and n.14 (5th Cir.1988) and *Todd v. C.I.R.*, 89 T.C. 912, 916-18 (1987), *citing* H.R.Conf.Rep. No. 861, 98th Cong., 2d Sess. 984-5 (1984).

3 1998 LGM TL-21, 1998 WL 1758202 (September 4, 1998); 1989 LGM TL-21, 1989 WL 989830 (August 7, 1989); 1990 LGM TL-21, 1990 WL 1086208 (February 2, 1990); 1988 LGM TL-21, 1988 WL 898187 (January 22, 1988). Cited as persuasive authority only.

§6621(c) after conclusion of a controversy.[4]

Treas.Reg. 301.6621-2T, A-5 is consistent with intent to encourage settlement and reduce litigation. Settlement obviates the need for trial on the merits of each ground for adjustment proposed by the IRS.[5] And where, as here, a settlement does not identify grounds for the adjustment, the determination of whether a liability is "attributable to" a TMT is made using all grounds originally proposed by the IRS.[6] Treas.Reg. §301.6621-2T, A-5 mandates that tax liability attributable to non-TMT grounds for adjustment are taken into account before TMT grounds when considering whether an underpayment is "attributable to" a TMT. Congress prefaced the virtually identical §6659 formula with instructions that: *"[t]he portion of a tax underpayment that is attributable to a valuation overstatement will be determined after taking into account any other proper adjustments to tax liability."*[7]

At least two consequences follow from the mandate to

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4 *Law v. C.I.R.*, 84 T.C. 985, 994-5 (1985).

5 In *Law*, the court noted that even after trial on the merits of each ground for adjustment there could still be multiple equally-valid grounds for an adjustment, some TMT and some not. 84 T.C. at 993-4.

6 *Weiner v. U.S.*, 389 F.3d 152-53 (5th Cir.2004); *Heasley v. C.I.R.*, 902 F.2d 380, 382 (5th Cir. 1990). The Government agrees that in the absence of a redetermination in the settlement, all grounds for adjustment originally asserted in the FPAA most be considered in making the §6621(c) determination. U.S.Opp. at n.4.

7 *Todd*, 862 F.2d at 542. [Emphasis in original.] Because both §6621(c) and §6659 require an "attributable to" determination and use an almost identical formula to make that determination, analysis and precedent for both provisions is used interchangeably. See *Heasley*, 902 F.2d at n.5; *McCrary v. C.I.R.*, 92 T.C. 827, 857-860 (1989); *Sinclair v. C.I.R.*, 58 T.C.M. (CCH) 1140, 1142 (1990).

take non-TMT grounds into account first: (i) it is improper to preferentially cherry-pick TMTs and exclude non-TMT grounds; and (ii) only underpayments that are *solely* attributable to TMTs are subject to §6621(c).[8] If the IRS shotguns the original grounds for adjustment, there is no basis to impose §6621(c) unless a settlement specifically attributes an adjustment to a TMT or agrees to §6621(c). These settlements did neither.

Contrary to the Government's assertion, it is not necessary for petitioners to refute any ground for adjustment in the FPAAs, sham or otherwise, to prove that §6621(c) interest was improperly assessed. The plain language of Petitioners' claims assert the IRS assessed §6621(c) in violation of Treas.Reg. §301.6621-2T, A-5. Pet.App.190 and 195 at ¶5. In the FPAAs the IRS proposed 10-20 grounds for completely disallowing the partnerships' farming expenses and other deductions, some TMTs and some not. Pet.App.220-225 and App:226-230. Petitioners settlements allowed over half of the farming expense deductions but did not identify the grounds for adjusting the portion that was disallowed. Application of Treas.Reg. §301.6621-2T, A-5 to these facts establishes that no portion of the resulting underpayment was "attributable to" a TMT.

Keener ignored Treas.Reg. §301.6621-2T, A-5. The *Keener* jurisdictional determination also improperly cherry-picked sham from among 10-20 alternative, equally-valid, mostly non-TMT grounds for adjustment. The Government likewise ignores the controlling regulation in its opposition brief and also cherry-picks sham.

Moreover, the Government's "jurisdictional" argument is actually an assertion that sham was the sole ground for adjustment, a defense to the merits of the claim. *Keener* and

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[8] See *Weiner*, 389 F.3d at 152-3 and authorities cited therein, including *Todd* and *Irom v. C.I.R.*, 866 F.2d 545 (2d Cir. 1989).

the Government conflate the merits of whether the regulation *was violated* with the jurisdictional question of whether the court *may consider* whether the regulation was violated.[9] This approach improperly reverses the proper sequence of determining jurisdiction before reaching the merits.[10]

Weiner illustrates this conflation of jurisdiction and merits and disproves the Government's assertion that nothing in *Weiner* is contrary to *Keener*. In *Weiner* the Government presented its sham argument for what it is, a defense to the merits of the claim, not a §7422(h) challenge. The trial court denied the plaintiff's motion for summary judgment based on Treas.Reg. §301.6621-2T and set the Government's sham defense for trial on the merits. [11] On appeal the Fifth Circuit did not reach the sham defense, finding that issue was moot because application of Treas.Reg. §301.6621-2T, A-5 proved no portion of the underpayment was attributable to a TMT, sham or otherwise.

Weiner expressly recognized that several of the many grounds for adjustment in the FPAAs were separable, independent non-TMTs, particularly "not trade or business" and "not ordinary and necessary under §162."[12] In *Keener*, the Federal Circuit intimated, without analysis or authority, that the grounds for adjustment in the FPAAs

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9 *FFTF Restoration Co., LLC v. U.S.*, 86 Fed.Cl. 226, 243-4 (Fed.Cl. 2009).

10 *Alliant Techsystems, Inc. v. U.S.*, 178 F.3 1260, 1265 (Fed.Cir. 1999).

11 *Weiner v. U.S.*, 255 F.Supp.2d 673, 676 (S.D.Tex. 2002).

12 *Weiner*, 389 F.3d at n.10.

were inseparable.[13] But most of the grounds for adjustment in *Weiner* are identical to those in *Keener*, including "not trade or business" and "not ordinary and necessary under §162." Pet.App:220, 226, 231, 236, 242, 250-1 at ¶5 and 6, and 248 at ¶ 2 and 3. The Government has not responded to this conflict between the Fifth and Federal Circuits.

The jurisdictional issue before the Court is whether petitioners' claims for refund of §6621(c) interest are claims for a "refund attributable to partnership items (as described in §6231(a)(3))." Petitioners do not disagree that the determination of partnership items can only be made in partnership-level proceedings. But petitioners do not seek determinations regarding any of the grounds for adjustment in the FPAAs or the nature of partnership items. When Treas.Reg. §301.6221-2T, A-5 is properly considered it becomes clear that petitioners' claims are not attributable to partnership items and not barred by §7422(h). They are claims for refund attributable to the IRS's failure to apply the formula at Treas.Reg. §301.6621-2T, A-5 as required before imposing §6621(c) rate of interest.

The Court of Federal Claims and the federal district courts have jurisdiction over §6621(c) claims. The Government does not refute that §6621(c) interest is not a §6231(a)(3) partnership item but is a §6231(a)(5) affected item and/or a §6231(a)(4) non-partnership item. In *Field*, the Second Circuit held §6621(c) is not a partnership item and not barred by §7422(h).[14] The Government attempts to distinguish *Field*, asserting the issue was whether §6621(c) is interest or a penalty. But the Government's authority

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13 *Keener*, 551 F.3d at 1367.

14 *Field v. U.S.*, 328 F.3d 58 (2nd Cir. 2003).

rests on a subsequent appellate decision.[15] The earlier decision reported at 328 F.3d 58 speaks for itself.

The *Keener* approach to §7422(h) urged by the Government here is over-broad and encompasses all affected items not just §6621(c) claims. There is no precedent for holding that *§6621(c)* is a partnership item, that *§6621(c)* should be determined at the partnership level, that all TMTs are partnership items, and/or that all components of TMTs *must* be determined at the partnership-level. There is certainly no authority for the proposition that review of IRS's actions based on the binding partnership items as determined is somehow itself "attributable to a partnership item."

In *Keller*, the Ninth Circuit specifically referred to its *River City*[16] holding in narrow terms: "the Tax Court-at the level of partnership proceedings-had jurisdiction to rule on the character of the partnerships' transactions for purposes of §6621(c) interest."[17] *Keller* also recognized the difference between jurisdiction to make partnership-level findings (as in *River City*) and jurisdiction over partner-level claims that the IRS improperly imposed §6621(c) after the partnership-level proceedings concluded without establishing a basis to impose §6621(c) (as here). In the latter instance, the partnership-item grounds for adjustment are not at issue, the Tax Court lacks jurisdiction over the §6621(c) claim, and the partner-level §6621(c) refund claims does not violate the §7422(h) prohibition. The Government has not addressed this distinction between the two types of claims.

While *Keener's* broad application of §7422(h) conflicts

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15 *Field v. U.S.*, 381 F.3d 109 (2nd Cir. 2004).

16 *River City Ranches # 1 Ltd. v. C.I.R.*, 401 F.3d 1136 (9th Cir. 2005).

17 *Keller v. U.S.*, 568 F.3d 710, 722 (9th Cir. 2009). Pet.App.83-4.

intra-circuit with *Prochorenko*,[18] that decision also conflicts with the Second Circuit's decisions in *Field* and *Monti* that §7422(h) should be narrowly read and applies only to claims for refund that are directly attributable to partnership items and not to claims that merely flow from partnership items.[19] The Government did not respond to this split in the Circuits.

Also, *Keener* leaves taxpayer-partners with no recourse if §6621(c) is improperly imposed after conclusion of the partnership-level proceeding and in conflict with the results of these proceedings. The Government's assertion that partners can and should address §6621(c) at the partnership-level is based on its refusal to address the true nature of petitioners' §6621(c) claims – the IRS assessed §6621(c) in violation of Treas.Reg. §301.6621-2T,A-5 after the partnership-level proceedings had concluded with respect to the settling partners. Those partners were no longer parties to the partnership-level proceeding and had no forum other than a partner-level action to challenge the improper post-settlement imposition of §6621(c). *Keller* recognized the partners' dilemma in such situations and held the partner-level court may and should address the improper imposition of §6621(c), otherwise taxpayers are left with no possible review.

While §6621(c) claims may be headed for extinction, *Keener* applies to any erroneous assessment attributable to an affected item where the assessment is not supported by settlement or decision. That jurisdictional determination, which ignores the §6621(c) formula, applies to §6659 overvaluation penalty claims, which is now one of the §6662 penalties currently imposed by the IRS. Moreover, the

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18 *Prochorenko v. U.S.*, 243 F.3d 1359 (Fed.Cir. 2001).

19 *Monti v. U.S.*, 223 F.3d 76 (2d Cir. 2000).

meaning of "attributable to a partnership item" under §7422(h) remains a critical issue in all TEFRA partnership proceedings and cases, even if §6621(c) is of little importance.

3. Limitations

The Government misapplies *AD Global* and fails to address the Fifth Circuit's August 11, 2009 *Curr-Spec* opinion creating another inter-circuit split on the limitations issue presented here.[20] U.S.Opp.14; Supp.App.1,9.

When the Petitioners filed their claims it was unsettled whether the limitations period for assessments attributable to partnership items was controlled by §6501(a), §6229(a), or both,[21] so they separately asserted:

(1) "[t]he assessment ... was made after ... limitations ... expired," [§6501(a)] and

(2) "[t]he assessment ... was made more than three years after the Partnership return was filed." [§6229(a)]

Pet.App.188,193,198,204.

In *AD Global* the Federal Circuit has now held that "§6229(a) does not create an independent statute of limitations," thereby extinguishing the Petitioners' §6229(a) claims but strengthening their §6501(a) claims by establishing §6501 as the only limitations period for assessing "tax imposed for partnership items." Supp.App.5-6,7. Under *AD Global*, §6229(a) merely provides a possible

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[20] *AD Global Fund, LLC v. U.S.*, 481 F.3d 1351 (Fed.Cir.2007); *Curr-Spec Partners v. C.I.R.*, — F.3d —, 2009 WL 2437764 (5th Cir. August 11, 2009).

[21] IRS Field Service Advisory (April 6, 1994) 1994 WL 1865975.

extension of §6501(a)'s assessment period and, therefore, can be raised only by the Government as an exception to a partner's §6501(a) assessment deadline.

It is undisputed that the Petitioners timely filed their 1984 and 1985 returns and, unless an exception applies, §6501(a)'s 3-year deadline expired before assessment. Therefore, they established their *prima facie* §6501(a) case.[22] The burden then shifted to the Government to prove any §6229 exception and the court's jurisdiction to consider that exception.[23]

The Petitioners' refunds are attributable to their §6501(a) assessment deadline, a §6231(a)(4) *non*-partnership item. If, *arguendo*, §6229(a) is a partnership item, §6501(a) is, at most, a §6231(a)(5) affected item and §7422(h) cannot bar jurisdiction because §6501(a) is not a §6231(a)(3) partnership item. *Keener* erroneously imposed its pre-*AD Global* §6229(a) jurisdictional analysis on the Petitioners' §6501(a) claims.

On August 11, 2009, the Fifth Circuit adopted the

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[22] *Hoffman v. C.I.R.*, 119 T.C. 140, 146 (2002); citing *Reis v. C.I.R.*, 142 F.2d 900 (6th Cir. 1944), aff'g 1 T.C. 9, 12 (1942); *Mecom v. C.I.R.*, 101 T.C. 374, 382 (1993), aff'd w/o publ. op. 40 F.3d 385 (5th Cir. 1994); *J.H. Rutter Rex Mfg. v. C.I.R.*, 853 F.2d 1275, 1281 (5th Cir. 1988).

[23] *Payne v. C.I.R.*, 224 F.3d 415, 420 (5thCir. 2000) ("when the government relies on an exception to [§6501(a)], it bears the burden of proving its entitlement to rely on that exception."); *Adler v. C.I.R.*, 85 T.C. 535, 540-41 (1985); *Amesbury Apartments v. C.I.R.*, 95 T.C. 227 (1990); *Armes v. C.I.R.*, 448 F.2d 972,974 (5th Cir. 1971); *Concrete Engineering v. C.I.R.*, 58 F.2d 566 (8th Cir. 1932), aff'g 19 B.T.A. 212 (1930); *Feldman v. C.I.R.*, 20 F.3d 1128, 1132 (11th Cir. 1994); *Blueport Co. v. U.S.*, 533 F.3d 1374, 1381 (Fed.Cir. 2008) (This shift is in keeping with "the long-established practice of placing the burden of establishing jurisdiction on the party 'who claims that the power of the court should be exerted in his behalf.'") quoting *McNutt v. G.M.A.C.*, 298 U.S. 178, 189 (1936).

Federal Circuit's *AD Global* analysis,[24] correctly recognizing

> (1) "The practical result of our holding today is that the Commissioner may issue an FPAA at *anytime*, subject only to the practical limitation that the FPAA may affect only those partners whose individual returns remain open under IRC §6501(a) or some extension thereto, such as the *minimum* period of IRC §6229(a), before which the statute of limitations may not expire," and
>
> (2) while its holding will "permit assessments against some partners and not against others, depending on their respective limitations periods under IRC §6501(a), this interpretation is consistent with the other portions of IRC §6229, which explicitly contemplate distinct treatment of different partners. If Congress intended a different result, it is for Congress — not this court — to re-draft the statutory language."

Supp.App.22, footnotes omitted.

The Fifth Circuit also

> [E]mphasize[d], however, that once a partner's individual [§6501(a)] limitations [period] for any given tax year has run without that period having been extended ... the Commissioner has no authority to assess tax based on any partnership items against that partner ..., even if the Commissioner subsequently issues an FPAA for that year. The plain language of IRC §6501(a) guarantees as much.

Supp.App.21, footnotes omitted.

AD Global does not support the Government's position but instead evidences the intra-circuit split between

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[24] Supp.App.10,17,19-20.

AD Global (as a matter of law §6501(a) is the only applicable limitations period with §6229(a) merely providing a possible extension) and *Keener* (the Petitioners' claims are based solely on §6229(a)'s "statute of limitations"). Pet.App.7. And there is now an inter-circuit split between the Fifth Circuit (*Curr-Spec*) and the Federal Circuit (*Keener*) on the same issue.[25]

Finally, the Government states that "petitioners agreed to waive the restrictions on the assessment and collection of any deficiency attributable to partnership items." U.S.Opp.4. The Government knew or should have known that this statement is false. Section 6501(a) controls assessments attributable to partnership items. The Forms 870-P(AD) had no §6501(a) waiver. Supp.App.27-39. The Petitioners settled their partnership items "[i]n order to end their involvement in" the partnership-level Tax Court suits. Pet.App.3-4. Sections 6229(f) and 6231(b)(1)(C) require assessment within one year of settlement, but §6225(a)(2) bars assessment until after partnership-level suits are final. To avoid this Catch-22 Forms 870-P(AD)s have a boilerplate waiver of "the restrictions ... provided in section 6225(a)." Supp.App.27,30,34,37. A §6225(a) waiver cannot waive a partner's §6501(a) limitations deadline. If the Government intended such a waiver it should have included it in the Forms 870-P(AD).

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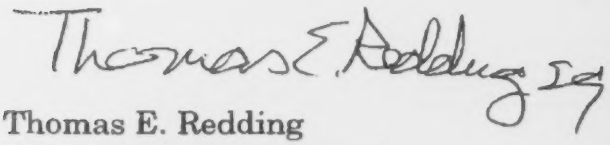
[25] *Curr-Spec* addressed tax year 1999 expressly relying on the 1997 §6226(d) and (f) amendments to determine those partners could have raised their §6501(a) claims in partnership-level Tax Court cases. Supp.App.15. But Congress expressly restricted those amendments to post 1996 tax years. The Petitioners' 1984 and 1985 §6501(a) claims have no such "express blessing," only an express bar. Pet.App.168.

Respectfully submitted.



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SEPTEMBER 2009

SUPPLEMENTAL APPENDIX

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United States Court of Appeals
for the Federal Circuit

06-5046

AD GLOBAL FUND, LLC,
by and through NORTH HILLS HOLDING, INC.,
a Partner Other Than the Tax Matters Partner,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

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Eileen J. O'Connor, Assistant Attorney General, Tax Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were Richard T. Morrison, Deputy Assistant Attorney General, and Gilbert S. Rothenberg, Robert W. Metzler, and Michael J. Haungs, Attorneys.

M. Todd Welty, Meadows, Owens, Collier, Reed, Cousins & Blau, L.L.P., for amici curiae, J&J Fernandez Ventures, L.P., et al.

Appealed from: United States Court of Federal Claims

Judge Christine O.C. Miller

United States Court of Appeals
for the Federal Circuit

06-5046

AD GLOBAL FUND, LLC,
by and through NORTH HILLS HOLDINGS, INC.,
a Partner Other Than the Tax Matters Partner,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: March 2, 2007

Before MAYER, PROST, Circuit Judges, and WHYTE, District Judge*.

WHYTE, District Judge.

This case concerns the interpretation of two sections of the Internal Revenue Code ("IRC"), I.R.C. §6229(a) and I.R.C. §6501. Appellant AD Global Fund, LLC ("AD Global") appeals from the judgment of the United States Court of Federal Claims. The Court of Federal Claims held that §6229(a) provides an extension of time to the statute of limitations in §6501 for assessing taxes on partnership items, not a separate statute of limitations for partnership items. AD Global Fund, LLC v. United States, 67 Fed. Cl. 657 (2005). Because we agree that §6229(a) does not provide a separate statute of limitations, but simply creates a minimum period that may extend the regular statute of

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* Honorable Ronald M. Whyte, District Judge, United States District Court for the Northern District of California, sitting by designation.

limitations for partnership items, we affirm.

I. BACKGROUND

AD Global is a limited liability company formed under the laws of the State of Delaware. North Hills Holding, Inc. ("North Hills") is a notice partner for AD Global. As a notice partner, North Hills filed the underlying civil action on behalf of AD Global and members of AD Global against the United States under I.R.C. §6226 challenging the validity of a Notice of Final Partnership Administrative Adjustment ("FPAA") issued by the Internal Revenue Service ("IRS").

AD Global is treated as a partnership for federal income tax purposes and is subject to the Uniform Partnership Procedures of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), I.R.C. §§6221-6234. The tax treatment of any partnership item[1] (and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item) is determined at the partnership level. I.R.C. §6221. The IRS may challenge the reporting of any partnership item on a partnership tax return (Form 1065) by issuing an FPAA, which serves as a predicate to its making individual partner tax assessments. I.R.C. §§6223(a)(2), 6225(a).

The FPAA at issue concerns AD Global's partnership tax year ending December 31, 1999. AD Global filed its 1999 partnership tax return on April 17, 2000. The IRS initiated administrative proceedings on May 27, 2003. On October 9, 2003, more than three years after AD Global had filed its 1999 return, the IRS issued an FPAA setting forth proposed adjustments and accuracy-related penalties to the partnership items reported in the return.

AD Global moved for summary judgment alleging that

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[1] Partnership items include "any item required to be taken into account for the partnership's taxable year." I.R.C. §6231(a)(3).

§6229(a) provides a separate statute of limitations for tax assessments on partnership items and that the FPAA was untimely under §6229(a). The Court of Federal Claims denied AD Global's motion for summary judgment, concluding that the regular statute of limitations in §6501(a) applies and that §6229(a) merely provides a minimum period for assessments for partnership items that may extend the time period set forth in §6501(a). If the conclusion of the Court of Federal Claims is correct, §6501(a) sets forth the assessment period for all assessments, including those attributable to partnership items, and allows assessments within 3 years after an individual partner files his or her return. AD Global does not claim that the FPAA was untimely if §6501(a) applies.

This appeal follows the order denying AD Global's motion for summary judgment which was certified for interlocutory appeal. We have jurisdiction pursuant to 28 U.S.C. §1292(c)(1).

II. DISCUSSION

This court reviews questions of statutory interpretation without deference. U.S. Steel Group v. United States, 225 F.3d 1284, 1286 (Fed. Cir. 2000). "As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (internal quotations and citations omitted). The inquiry ends "if the statutory language is unambiguous and the statutory scheme is coherent and consistent." Id. (internal quotations and citation omitted).

Section 6229(a) is entitled "Period of limitations for making assessments" and provides:

Except as otherwise provided in this section, the

> period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of--(1) the date on which the partnership return for such taxable year was filed, or (2) the last day for filing such return for such year (determined without regard to extensions).

Section 6501(a) provides in pertinent part: "Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . . ."

The Court of Federal Claims concluded that the language in §6229(a) is ambiguous because both AD Global and the United States' interpretations of the statutory language are plausible. It found the United States' interpretation plausible because §6229(a) does not explicitly state that it is an exception to the general statute of limitations in §6501 and uses the terminology "shall not expire before" rather than language traditionally associated with statutes of limitations. Nevertheless, the court found AD Global's interpretation plausible because §6229(a) is entitled "period of limitations" and §6229 refers to "periods of limitations" throughout.

Reading §6229(a) together with §6501, we conclude that §6229(a) unambiguously sets forth a minimum period for assessments of partnership items that may extend the regular statute of limitations in §6501. Section 6501 explicitly provides that it applies to any tax imposed by the title, which would include tax imposed for partnership items. See Andantech L.L.C. v. Comm'r, 331 F.3d 972, 976-77 (D.C. Cir. 2003) ("The plain language of §6501 compels its applications to all assessments."). No exception is

provided for assessment of taxes for partnership items.[2] Section 6501 simply cross-references §6229(a) as an "extension" of period for partnership items. See I.R.C. §6501(n)(2) ("For extension of period in the case of partnership items (as defined in section 6231(a)(3)), see section 6229."); Crnkovich v. United States, 202 F.3d 1325, 1335 n.7 (Fed. Cir. 2000). Moreover, the statute of limitations set forth in §6501 is couched in mandatory terms setting forth the maximum period within which tax assessments must be made: "shall be assessed within 3 years after the return was filed."

By contrast, the language in §6229(a) does not state a maximum period. Section 6229(a) employs the term "shall not expire before," which creates a minimum period during which the period for tax assessments for partnership items may not end. This minimum period may expire before or after the maximum period provided in §6501. Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm'r, 114 T.C. 533, 542 (2000).

We are not persuaded by the trial court's conclusion that use of the phrase "period of limitations" renders the statute ambiguous as to whether it creates a separate statute of limitations. Where Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Barnhart, 534 U.S. at 452. Unlike the unequivocal language creating a statute of limitations in §6501, §6229(a) contains no mandatory words establishing a time within which assessments must be made. As we

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[2] AD Global argues that the statute of limitations in §6501 cannot apply to partnership items because the period specified in §6501 is not incorporated into §6229(a). However, §6501(a) is the general statute of limitations. If §6229(a) were to operate as a separate statute of limitations, it would be the exception to the general rule in §6501.

noted in Crnkovich, 202 F.3d at 1335 n.7, the three-year limitations period in §6229(a) does not unambiguously define an end date for making an assessment because it uses the phrase "shall not expire before" and thus "leaves open the possibility that the applicable limitations period may expire after the periods set forth therein." Because §6229 does not state an end date or otherwise set forth a maximum period, it does not, on its face, create a statute of limitations.

Based on the plain text of the statute, §6229(a) does not create an independent statute of limitations. Because we conclude the statute is unambiguous as to this issue, we do not reach an analysis of the legislative history and legislative intent.

We also conclude that this interpretation is consistent with the overall statutory scheme. AD Global argues that Congress enacted TEFRA so that partnership items may be determined in a single proceeding at the partnership level rather than through "fragmented, duplicative, and potentially inconsistent separate proceedings for each partner." TEFRA generally requires determination of the tax treatment of partnership items at the partnership level. I.R.C. §6221. In the partnership-level administrative proceeding, the IRS may adjust items reported on the partnership tax return which, in turn, would affect the corresponding items on the income tax returns of the individual partners. See I.R.C. §6226(c); Crnkovich, 202 F.3d at 1328. Each partner receives notice of the beginning of such an administrative proceeding, may participate in the proceeding, and receives notice of the FPAA. See I.R.C. §§6223, 6224(a); Crnkovich, 202 F.3d at 1328.

This scheme contemplates that adjustments to partnership items are made in one proceeding before assessments are made at the individual partner level. Our interpretation may extend the regular statute of limitations

in §6501(a) for assessments to individual partners, but it does not alter the statutory scheme of determining partnership items in one partnership-level proceeding. Our construction, therefore, is consistent with a statutory scheme that intends that adjustments to a partnership tax return be completed in one consistent proceeding before individual partners are assessed for partnership items.

III. CONCLUSION

For the aforementioned reasons, we affirm.

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
August 11, 2009
Charles R. Fulbruge III
Clerk

No. 08-60815

CURR-SPEC PARTNERS, L.P.

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent-Appellee

Appeal from a Decision of
the United States Tax Court

Before REAVLEY, WIENER, SOUTHWICK, Circuit Judges.

JACQUES L. WIENER, Circuit Judge:

Petitioner-Appellant Curr-Spec Partners, L.P. ("Curr-Spec"), asks us to interpret the interplay between the limitation provisions of Internal Revenue Code ("IRC") §6229(a) and IRC §6501(a). Specifically, we are asked to determine whether IRC §6229(a) provides an independent limitations period for Respondent-Appellee Commissioner of Internal Revenue's (the "Commissioner's") issuance of a notice of Final Partnership Administrative Adjustment ("FPAA"). The Tax Court ruled in favor of the Commissioner, holding that IRC §6229(a) does not provide a separate statute of limitations for partnership items and

that the relevant limitations periods are those of each individual partner-generally three years *after the date of filing the individual's return*-as set forth in IRC §6501(a).[1] The Tax Court reasoned that the limitations period of IRC §6229(a) can prolong-but can never shorten-the period within which the Commissioner may assess individual tax liabilities attributable to partnership items. Although this issue of statutory interpretation is *res nova* in this circuit, the Tax Court sitting as an *en banc*-like court,[2] the D.C. Circuit,[3] and the Federal Circuit[4] have each resolved it in favor of the Commissioner. Affirming the Tax Court's decision, we now join these other courts and hold that IRC §6229(a) does not establish an independent statute of limitations for issuing FPAAs.

I. FACTS AND PROCEEDINGS

On October 11, 2000, the partnership, Curr-Spec, filed a Form 1065, U.S. Partnership Return of Income, for the

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1 Even though the statute of limitations runs three years after the date that the return was *filed*, *see* IRC §6501(a), a return filed early is generally deemed filed on the date that the return was due, thereby giving the Commissioner more than three years within which to assess tax. *See id.* §6501(b)(1).

2 *Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner*, 114 T.C. 533, 2000 WL 863142 (2000) (en banc). Technically, the Tax Court does not sit *en banc*. Nevertheless, the full Tax Court reviews cases that the Chief Judge selects for review by the entire court. *See* IRC §7460; David F. Shores, *Deferential Review of Tax Court Decisions:* Dobson *Revisited*, 49 TAX LAW. 629, 646 n.117 (1996). *Rhone-Poulenc* is one such case, and, for simplicity, we will refer to it as decided *en banc*.

3 *Andantech L.L.C. v. Commissioner*, 331 F.3d 972 (D.C.Cir.2003).

4 *AD Global Fund, LLC ex rel. N. Hills Holding, Inc. v. United States*, 481 F.3d 1351 (Fed.Cir.2007).*Andantech L.L.C. v. Commissioner*, 331 F.3d 972 (D.C.Cir.2003).

taxable year 1999. More than four years later, on October 13, 2004, the Commissioner issued an FPAA determining that (1) the partnership was a sham, (2) as a result, all transactions in which it engaged would be treated as engaged in by the individual partners directly, (3) all income, deductions, gains, and losses reported by the partnership would be disallowed, and (4) the partners would be treated as having no basis in their respective partnership interests. Curr-Spec timely filed a petition in the Tax Court seeking review of the Commissioner's determination. Curr-Spec then filed motions (1) to dismiss for lack of jurisdiction and to strike, and (2) for summary judgment, contending, *inter alia,* that because the FPAA was issued more than three years after both the due date of the partnership's 1999 return and the date on which it was filed, the period of limitations for assessing tax attributable to partnership items had expired. Curr-Spec based its argument on its interpretation of IRC §6229(a) as an independent three-year statute of limitations (subject to specific extensions) for issuing an FPAA.

The Commissioner responded that at least three Curr-Spec partners had claimed net operating loss carryforwards of a 1999 partnership item on their respective individual 2000 and 2001 returns. The Commissioner proposed to assess tax based on the claimed carryforwards on these partners' 2000 and 2001 returns, under the theory that the FPAA was issued less than three years after the partners had filed their respective individual tax returns for those tax years, *viz.*, within the statute of limitations for individual returns as set forth in IRC §6501(a).

The Tax Court ruled in favor of the Commissioner, emphasizing that the Internal Revenue Code "prescribes no

period during which TEFRA [5] partnership-level proceedings, which begin with the mailing of an FPAA, must be commenced." The court held that IRC §6229(a) does not provide an assessment period independent of the three-year individual limitations period of IRC §6501(a); that instead IRC §6229(a) provides a three-year minimum, which can extend IRC §6501(a)'s period, but cannot curtail it.

This timely appeal followed, in which Curr-Spec challenges only the timeliness of the FPAA.[6]

II. ANALYSIS

A. Standard of Review

We review a Tax Court decision the same way that we would review a district court decision.[7] In the instant case, Curr-Spec presents purely an issue of statutory interpretation, which we review *de novo*.[8]

B. Statutory Framework

"[TEFRA] ... prescribes the administrative and litigation procedures for addressing partnership tax issues."[9] "[It] requires partnerships to file informational returns reflecting the distributive shares of income, gains, deductions, and credits attributable to its partners.

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5 "TEFRA" is the Tax Equity and Fiscal Responsibility Act of 1982.

6 In the instant proceedings, Curr-Spec has stipulated to the merits of the Commissioner's adjustments in the FPAA.

7 *Minton v. Commissioner*, 562 F.3d 730, 734 (5th Cir. 2009) (per curiam).

8 *Copeland v. Commissioner*, 290 F.3d 326, 329 (5th Cir.2002).

9 *United States v. Martinez* (*In re Martinez*), 564 F.3d 719, 726 (5th Cir.2009) (citing Pub.L. No. 97-248, §402(a), 96 Stat. 648, 653 (1982) (codified as amended at IRC §§6221-23)).

Accordingly, the individual partners are responsible for reporting their pro rata share of tax on their income tax returns."[10] Items more appropriate for determination at the partnership level are designated "partnership items," which are to be treated at the partnership level; other items are designated "nonpartnership items," which are to be treated at the individual partner level.[11]

When the IRS proposes an adjustment of taxes at the partnership level, it issues a notice of adjustment, the FPAA, which is analogous to the statutory notice of deficiency furnished to individuals.[12] After the FPAA becomes final, the Commissioner may assess tax to the individual partners whose tax returns for the year or years in question remain open under IRC §6501(a), for those partners' distributive shares of the adjusted partnership items.[13]

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10 *Weiner v. United States,* 389 F.3d 152, 154 (5th Cir.2004) (internal citation omitted); *see* IRC §6031 (partnership returns); *id.* §§701-04 (individual partners' reporting distributive shares of partnership income).

11 *In re Martinez,* 564 F.3d at 726; *see* IRC §6221 (mandating that partnership items be determined at the partnership level). A "partnership item" is statutorily defined as:

> any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

IRC §6231(a)(3); *see id.* §6231(a)(4) (defining "nonpartnership item").

12 *In re Martinez,* 564 F.3d at 726 (citing IRC §6223(a)).

13 *See* IRC §6225(a) (stating that the FPAA becomes final if it goes unchallenged for 150 days, or upon final judicial resolution of a petition for review of the FPAA). The IRS may sometimes assess this tax on individual partners, without notice, as a computational adjustment. *See*

IRC §6501(a) is the three-year statute of limitations which is generally applicable to the Commissioner's assessment of tax.[14] That section states:

> **General rule.**– Except as otherwise provided in this section, the amount of any tax imposed by this title *shall be assessed within 3 years* after the return was filed ..., and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period....[15]

IRC §6229(a), which Curr-Spec contends is a three-year statute of limitations for issuing an FPAA-and which, in the Commissioner's and the Tax Court's views, can only extend but not shorten the IRC §6501(a) period-states:

> **General rule.**– Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year *shall not expire before* the date which is 3 years after the later of-
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> (1) the date on which the partnership return for such taxable year was filed, or

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Callaway v. Commissioner, 231 F.3d 106, 109-10 (2d Cir.2000) (citing IRC §§6225(a), 6230(a)(1), 6231(a)(6)). Other times, factual determinations of "affected items" at the partner level are necessary, which requires the issuance of a notice of deficiency. *See id.* at 110 (citing IRC §6230(a)(2)(A)(i)); *see also* IRC §6231(a)(5) (defining "affected item" as "any item to the extent such item is affected by a partnership item").

[14] *Payne v. Commissioner*, 224 F.3d 415, 419-20 (5th Cir.2000). This statute of limitations is subject to provisions in IRC §6501, IRC §6503, and elsewhere that toll the limitations period, *see Doe v. KPMG, LLP*, 398 F.3d 686, 688-89 (5th Cir.2005), none of which are at issue in the instant appeal.

[15] IRC §6501(a) (emphasis added).

> (2) the last day for filing such return for such year (determined without regard to extensions).[16]

C. IRC §6229(a) Does Not Establish an Independent Statute of Limitations for the Issuance of an FPAA

1. Jurisdiction

As an initial matter, Curr-Spec contends that in a partnership proceeding, courts have no jurisdiction to consider the filing date of a partner's individual return because that is not a partnership item but rather a nonpartnership item. [17] The scope of the Tax Court's jurisdiction in partnership proceedings, Curr-Spec argues, is limited to determination of "all partnership items of the partnership for the partnership taxable year to which the [FPAA] relates, the proper allocation of such items among partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item."[18] Yet, Congress has made clear that any partner "shall be permitted to participate in [partnership-level litigation] solely for the purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired *with respect to such person,* and the court having jurisdiction of such action shall have jurisdiction to consider such assertion."[19] Armed with Congress's express blessing, the Tax Court does not exceed its jurisdiction when it considers

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16 *Id.* §6229(a) (emphasis added).

17 As in the principal issue of statutory interpretation presented in Curr-Spec's appeal, our review of the Tax Court's jurisdiction is *de novo. Ferguson v. Commissioner,* 568 F.3d 498, 502 (5th Cir.2009).

18 IRC §6226(f).

19 *Id.* §6226(d)(1) (emphasis added).

the filing date of a partner's individual return.[20]

2. Merits

Curr-Spec asserts that even if the Tax Court is not jurisdictionally barred from referencing the filing date of a partner's individual return, a plain reading of IRC §6229 and IRC §6501 *in pari materia* yields Curr-Spec's desired result, *viz.*, that IRC §6229(a) is an independent three-year limitations period for the issuance of an FPAA, which period begins to run on the later of the date that the partnership files its informational return or the date that it is due. In Curr-Spec's view, the TEFRA partnership procedures establish a time line governing when an FPAA may be issued, which is entirely independent of and distinct from-and which supercedes-the general time line specified by IRC §6501. The Commissioner counters that IRC §6229(a), by its terms, sets no limitation period for the issuance of an FPAA. The Commissioner argues that-for partnership items-IRC §6229(a) works to extend the IRC §6501(a) limitations periods of the individual partners under circumstances when those periods would otherwise expire less than three years following the later of the filing date or due date for the filing of the partnership's return, disregarding extensions.

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[20] Our opinion in *Weiner v. United States* is not to the contrary. 389 F.3d 152 (5th Cir. 2004). We decided that case on the dissimilar issue "whether district courts have jurisdiction to decide the FPAA statute of limitations question in [individual] refund actions." *Id.* at 155. More specifically, we asked "whether the taxpayers' refund requests [were] attributable to any partnership item such that the district court would be deprived of jurisdiction." *Id.* We concluded that IRC §6229(a)'s period was a partnership item and that thus "the district courts lack jurisdiction to decide the FPAA statute of limitations issue" (which, today, we conclusively determine is not an independent "statute of limitations"). *See id.* at 156, 159. In *Weiner*, we had no occasion to inquire whether, in a partnership proceeding, the Tax Court was deprived of jurisdiction to consider the filing date of a partner's individual return.

"When the plain language of a statute is unambiguous and does not lead to an absurd result, our inquiry begins and ends with the plain meaning of that language."[21] The unambiguous language of IRC §6229(a) and IRC §6501(a) mandates our conclusion that IRC §6501(a) creates a three-year limitations period within which the Commissioner must assess "any tax" on individual partners-a period which IRC §6229(a) can never shorten, regardless of the length of time that might have elapsed between the filing of the partnership's informational return and the Commissioner's issuance of an FPAA. Rather, IRC §6229(a) establishes only the *minimum* time period that, when necessary, extends, i.e., supercedes, the general three-year limitations period of IRC §6501(a). For partnership items, the otherwise applicable limitations period of IRC §6501(a) " *shall not expire before* the date which is 3 years after the later of ... the date on which the partnership return ... was filed" or the date on which it was due.[22] In reaching this conclusion, we find persuasive (1) the Tax Court's *en banc* decision in *Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner,*[23] (2) the D.C. Circuit's opinion in *Andantech L.L.C. v. Commissioner,*[24] and (3) the Federal Circuit's opinion in *AD Global Fund, LLC ex rel. North Hills Holding, Inc. v. United States.*[25]

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21 *United States v. Dison,* — F.3d —, 2009 WL 1759029, at *2 (5th Cir. 2009) (internal quotation marks and citation omitted).

22 IRC §6229(a) (emphasis added).

23 114 T.C. 533, 2000 WL 863142 (2000) (en banc).

24 331 F.3d 972 (D.C.Cir.2003).

25 481 F.3d 1351 (Fed.Cir.2007). The Ninth Circuit has also referred to IRC §6229(a) as a minimum period for assessment. *Bakersfield Energy Partners, LP v. Commissioner,* 568 F.3d 767, 770 n. 5 (9th Cir.2009) ("Subsection (a) [of IRC §6229] provides the minimum time period in

In *Rhone-Poulenc,* the Tax Court said:

> Section 6501 unequivocally provides the period of limitations within which "the amount of *any* tax imposed by this title shall be assessed." Generally, the period of limitations so provided is 3 years from the date the taxpayer's return was filed but varies in the case of certain enumerated exceptions. The pertinent language of section 6229 is: "*[T]he period for assessing any tax imposed by subtitle A* with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year *shall not expire before* the date which is 3 years after the later of" the filing or due date of the partnership return. Section 6229 provides a *minimum* period of time for the assessment of any tax attributable to partnership items (or affected items) notwithstanding the period provided for in section 6501, which is ordinarily the *maximum* period for the assessment of any tax. The section 6229 minimum period may expire before or after the section 6501 maximum period. Indeed, section 6501(n)(2) cross-references section 6229 by providing: "For *extension* of period in the case of partnership items (as defined in section 6231(a)(3)), see section 6229." [26]

In *Andantech,* the D.C. Circuit, quoted the foregoing *Rhone-Poulenc* language, and determined that nothing in the Tax Court's reasoning gave it pause.[27] That court thus concluded that IRC §6501(a)'s statute of limitations is

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which the IRS can assess a tax deficiency.").

[26] 114 T.C. at 542 (internal citations and footnotes omitted) (emphases added by Tax Court).

[27] 331 F.3d at 977.

applicable to all assessments made under the chapter and that IRC §6229(a) can only extend, not cut short, the IRC §6501(a) period for partnership items.[28] The *Andantech* court further stated that "the language of §6229, rather than simply stating a three-year statute of limitations, indicates by the use of the term 'shall not expire' that the provision is intended to dictate a minimum period, but not an absolute restriction."[29]

The Federal Circuit, in *AD Global Fund,* reached the same result as had the D.C. Circuit and the *en banc* Tax Court before it. The court in *AD Global Fund* emphasized that

> [IRC] §6229(a) unambiguously sets forth a minimum period for assessments of partnership items that may extend the regular statute of limitations in §6501. Section 6501 explicitly provides that it applies to any tax imposed by the title, which would include tax imposed for partnership items ..., [and] [n]o exception is provided for assessment of taxes for partnership items.[30]

> Additionally, that court found it significant that-unlike IRC §6229(a)-IRC " §6501 is couched in mandatory terms setting forth the maximum period within which tax assessments must be made: 'shall be assessed within three years after the return was filed.' "[31] In contrast, IRC " §6229(a) employs the term 'shall not expire before,' which creates a minimum period during which the period for tax

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28 *Id.*

29 *Id.*

30 481 F.3d at 1354 (internal citation omitted).

31 *Id.* (quoting IRC § 6501(a)).

assessments for partnership items may not end."[32] And, "[w]here Congress 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' "[33] The Federal Circuit viewed the use of "shall not expire before" in IRC §6229(a) as significant. That court described its result as consistent with the TEFRA scheme, which generally requires determination of the tax treatment of partnership items at the partnership level before they are assessed at the partner level.[34] First, the Commissioner ascertains all partnership items in a consolidated partnership-level determination; then IRC §6501 controls, separately as to each individual partner, the tax consequences of that initial partnership-level determination.[35] IRC §6229(a) "may extend the regular statute of limitations in §6501(a) for assessments to individual partners, but it does not alter the statutory scheme of determining partnership items in one partnership-level proceeding."[36]

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32 *Id.; see Salman Ranch Ltd. v. United States,* — F.3d —, 2009 WL 2256020, at *3 (Fed.Cir.2009) (explaining that the general three-year period of IRC § 6501(a) applies to partnership items and that IRC §6229(a) sets only a *minimum* period for assessments of partnership items).

33 *AD Global Fund,* 481 F.3d at 1354 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002)).

34 *Id.* at 1354-55.

35 *Id.* at 1355.

36 *Id.*

We perceive no flaw in the interpretations of those courts, which reached the instant issue before we did, and we adopt their analyses.[37] We emphasize, however, that once a partner's individual three-year statute of limitations under IRC §6501(a) for any given tax year has run without that period having been extended under IRC §6229 or any other statute,[38] the Commissioner has no authority to assess tax based on any partnership items against that partner for that closed tax year, even if the Commissioner subsequently issues an FPAA for that year. The plain language of IRC §6501(a) guarantees as much. As counsel for the Commissioner represented at oral argument, "[i]f one partner carried [partnership losses] over ten years, but the others did not and used it all in '99, the Commissioner wouldn't be able to assess against them.... It's only to the extent that a partner's individual statute of limitations is

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37 The unambiguous statutory language mandates our result today. Nevertheless, even if the correct decision were not so clear, we would look to the opinions of the D.C. and Federal Circuits for persuasive guidance. *See Alfaro v. Commissioner,* 349 F.3d 225, 229 (5th Cir.2003) ("We are always chary to create a circuit split.").

38 The limitations period may be extended for any of several reasons. As we have discussed, IRC §6229(a) provides for an extension when three years from the date the partnership return is filed or is due has not yet expired. The IRC §6229(a) period itself is suspended when the Commissioner files an FPAA. *See* IRC §6229(d). The FPAA suspends the running of the IRC §6229(a) period until one year after the close of the period during which a petition for readjustment of the partnership items may be filed, or, if such a petition is filed, one year after the court's decision in that proceeding becomes final. *Id.; see United States v. Martinez* (*In re Martinez*), 564 F.3d, 719, 727 (5th Cir.2009). Of course, if a partner's limitations period has already closed, IRC §6229(d) cannot re-open that period.

An individual's limitations period would also be extended *forever* if that person filed "a false or fraudulent return with the intent to evade tax." IRC §6501(c)(1).

still open that we could do an assessment."

The practical result of our holding today is that the Commissioner may issue an FPAA at *anytime,* subject only to the practical limitation that the FPAA may affect only those partners whose individual returns remain open under IRC §6501(a) or some extension thereto, such as the *minimum* period of IRC §6229(a), before which the statute of limitations may not expire. Stated differently, the Commissioner is free to assess partnership-item tax on any taxpayer who, on his individual tax return, has taken advantage of the now-challenged partnership items within the preceding three years (or, in the event of an extension, within the extended statute of limitations). Even though our holding will permit assessments against some partners and not against others, depending on their respective limitations periods under IRC §6501(a), this interpretation is consistent with the other portions of IRC §6229, which explicitly contemplate distinct treatment of different partners.[39] If Congress intended a different result, it is for Congress — not this court — to re-draft the statutory language.[40]

We continue briefly to explain that our decision today does not contradict this circuit's precedent. On at least two

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[39] *See, e.g.,* IRC §6229(b)(1)(A) (permitting partners to enter into *individual agreements* with the Commissioner to extend the three-year period of IRC §6229(a)); *id.* §6229(c)(1) (setting different limitations periods for partners when a partnership submits a false or fraudulent return, depending on each partner's involvement in the fraud); *id.* §6229(h) (providing for a suspension of the IRC §6229(a) period for a partner who enters bankruptcy proceedings).

[40] *Lamie v. U.S. Trustee,* 540 U.S. 526, 542, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent.").

occasions — in *Weiner v. United States*[41] and *In re Martinez*[42] — we have referred to IRC §6229(a) as a three-year statute of limitations. Yet, those descriptions were mere dicta,[43] and they did not address the relationship of IRC §6229(a) to IRC §6501(a). They thus do not constrain today's decision. *Weiner* involved multiple partners who had commenced *partner-level refund suits*, arguing that IRC §6229(a) statutorily barred an FPAA.[44] There we had no need to consider the merits of the taxpayers' argument because we determined that IRC §7422(h) deprived us of jurisdiction.[45] IRC §7422(h) provides that "[n]o action may be brought for a refund attributable to partnership items."[46]

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41 389 F.3d 152, 154-55 (5th Cir.2004).

42 *United States v. Martinez (In re Martinez)*, 564 F.3d 719, 724, 726 (5th Cir.2009).

43 *See Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 385-86 (5th Cir.1998) ("That which is 'obiter dictum' is stated only 'by the way' to the holding of a case and does not constitute an essential or integral part of the legal reasoning behind a decision." (citing Charles W. Collier, *Precedent and Legal Authority*, 1988 WIS. L.REV. 771, 772)); *see also United States v. Crawley*, 837 F.2d 291, 292 (7th Cir.1988) (Posner, J.) (noting that as a practical matter, a court can determine whether a particular passage in an earlier opinion is dictum by considering factors such as whether "the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential to the outcome," or whether "the passage was not an integral part of the earlier opinion — it can be sloughed off without damaging the analytical structure of the opinion, and so it was a redundant part of that opinion and, again, may not have been fully considered").

44 389 F.3d at 156.

45 *Id.* at 156-59.

46 IRC §7422(h).

And, because we held that the IRC §6229(a) period is a partnership item, "the district courts lack jurisdiction to decide the FPAA statute of limitations issue." [47] The jurisdictional issue was dispositive in *Weiner;* to the extent we discussed IRC §6229 as a strict statute of limitations for the issuance of an FPAA, it was mere dicta.

In *In re Martinez,* the issue was the extent to which a partnership's *conflicted* tax-matters partner could bind the other partners to an agreement into which he and the Commissioner had entered to extend the IRC §6229(a) period.[48] Under IRC §6229(b)(1)(B), such agreements usually bind all partners. [49] The *In re Martinez* taxpayer (who was not the tax-matters partner) argued that the tax-matters partner's conflict of interest nullified his actions with respect to the partnership. We acknowledged that "there may be times when a tax matters partner's actions beneficial to himself are so contrary to the interests of the partnership that they are rendered null with respect to the partners."[50] We concluded, however, that *In re Martinez* was not such a case, and that the extension granted to the

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[47] *See Weiner,* 389 F.3d at 156, 159. We did state, however, that one factor in favor of determination at the partnership level was that "[t]he timeliness of an FPAA affects the IRS's ability to make adjustments to partnership items, which in turn affects all partners alike." *Id.* at 158. This statement remains true because an extension of the IRC §6501(a) statute of limitations by IRC §6229(a) affects the IRS's ability to adjust partnership items, which affects all partners alike.

[48] *United States v. Martinez* (*In re Martinez*), 564 F.3d 719, 727 (5th Cir. 2009).

[49] *See* IRC §6229(b)(1)(B) ("The period described in subsection (a) ... may be extended ... with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner ... before the expiration of such period.").

[50] *In re Martinez,* 564 F.3d at 728.

Commissioner applied to all partners.[51] As in *Weiner*, the interplay of IRC §6229(a) and IRC §6501(a) was not at issue, and our reference to IRC §6229(a) as a three-year statute of limitations was dicta. We thus have not previously had occasion to address squarely the instant issue, and our decision today is not in conflict with our precedent.[52]

III. CONCLUSION

We hold that the Tax Court correctly interpreted IRC §6229(a) and IRC §6501(a). IRC §6229(a) is not an

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[51] *Id.*

[52] Curr-Spec also interprets the Second Circuit's opinion in *Callaway* as rejecting *Rhone-Poulenc*. *Callaway v. Commissioner*, 231 F.3d 106, 110 (2d Cir.2000). As in our circuit's precedent, *Callaway*'s discussion of IRC §6229(a) occurred in dicta. *See id.* at 110 (referring to IRC §6229 as a three-year statute of limitations, which "supercedes" the individual partner's three-year period under IRC § 6501); *id.* at 112-13 (describing the effect that IRC §6229(a) would have had in the absence of an extension). The issue in *Callaway* was the conversion of partnership items into nonpartnership items. *See id.* at 116. The relationship of IRC §6229(a) to IRC §6501(a) was not at issue. In fact, *Callaway* interpreted the similar "shall not expire before ... 1 year" language of IRC §6229(f) as prescribing the time within which "the limitations period on assessments ... could not have expired *sooner*." *Id.* at 122 & n. 20 (emphasis in original). The court expressly said that, depending on the facts, such a provision might "not provide the limiting date." *Id.* Our analysis in the instant case is consistent with such an interpretation. Additionally, the Second Circuit has, in a subsequent case, cautioned that IRC "section 6229(a), by its terms, does not purport to *limit* the time available to assess tax, but only to *extend* limitations otherwise applicable." *Field v. United States*, 381 F.3d 109, 112 n. 1 (2d Cir.2004) (emphasis in original). Such language offers a clear indication that the Second Circuit does not view *Callaway* as having held the opposite. *See U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 149 (2d Cir.2001) ("[W]e will not overrule a prior decision of a panel of this Court absent a change in the law by higher authority or by way of an in banc proceeding of this Court." (internal quotation marks omitted)).

independent statute of limitations, i.e., it sets no maximum period within which the Commissioner must issue an FPAA. The three-year statute of limitations of IRC §6501(a) is the period within which the Commissioner may assess taxes on an individual partner (subject to *extension*) for partnership items. We also hold that the Tax Court does not overreach its jurisdiction in partnership-level proceedings when, for limitations purposes, it considers whether a partner's individual tax return remains open to assessment.

AFFIRMED.

Form 870-P(AD) (5-88) Date: 12-20-96	Department of the Treasury Internal Revenue Service Settlement Agreement For Partnership Adjustments	In Reply Refer To: MS 4550 122096-0740

Taxpayer(s) Name(s) and Address	Name of Partnership
Kenneth C Keener XXXXXXXXXX Drive Austin, TX XXXXX TIN: XXXX-XXX-XXXX	Agri-Venture-II TIN: 33-0053999 Tax Year Ended: 1984

Under the provisions of section 6224(c) of the Internal Revenue Code, the undersigned offers to enter into a settlement agreement with respect to the determination of partnership items of the partnership for the year shown on the attached schedule of adjustments. The undersigned, in accordance with the provisions of section 6224(b) of the code, also offers to waive the restrictions on the assessment and collection of any deficiency attributable to partnership items (with interest as required by law) provided in section 6225(a).

This offer is subject to acceptance for the commissioner of the internal revenue service. It will take effect as a waiver of restrictions on the date it is accepted. Unless and until it is accepted, it will have no force or effect.

If this offer is accepted for the commissioner, the treatment of partnership items under this agreement will not be reopened in the absence of fraud, malfeasance, or misrepresentation of fact; and no partnership items may be filed or prosecuted.

Signature of Taxpayer	Date
/s/ Kenneth C. Keener	3-21-97
Signature of Taxpayer	Date
By (Signature and Title)	Date

If this offer is executed by a tax matters partner, please include title with the signature.

Note: the execution and filing of this offer will expedite the adjustment of tax liability.

If this offer is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, unless one spouse, acting under a power of attorney, signs as agent for the other.

If the taxpayer is a corporation, the offer must be signed with the corporate name followed by the signature and title of the officer authorized to sign.

This offer may be executed by the taxpayer's attorney or agent provided this action is specifically authorized by a power of attorney, which, if not previously filed, must accompany this form.

The submission of this offer by you and the acceptance of the offer for the commissioner may result in an additional tax liability to you plus interest as provided by law. If the result is a decrease in tax, the amount of the decrease will be sent to you with interest as provided by law.

	DATE ACCEPTED FOR COMMISSIONER	SIGNATURE
FOR INTERNAL REVENUE USE ONLY	28 APR 1997 OFFICE	/s/ Larry Pagna [*sic.*] TITLE Associate Chief OGDEN, UTAH

SALT LAKE CITY APPEALS OFFICE FORM 870-P(AD) (5-88)

Stamped: RECEIVED ESU APR-3 1997 OGDEN SERVICE CENTER

Settlement Agreement For Partnership Adjustments

	Schedule of Adjustments		
Name of Partnership AGRI-VENTURE II Taxpayer Identification Number: 33-0053999	Tax Year(s) Ended December 31, 1984		
Detail of Adjustments to Ordinary Income			
Schedule F – Farming Loss	8,614,381		
Other Deductions	149,842		
Total Adjustments to Ordinary Income	8,764,223	0	0
Other Adjustment: T.P I. – Qualified Investment Expense			
(1) Adjustment	(15,182,640)		
(2) As Reported	24,099,428		
(3) Corrected	8,916,788	0	0
Other Adjustment. T.P.I. – Qualified Investment Income			
(1) Adjustment	0		
(2) As Reported	19,889		
(3) Corrected	19,889	0	0
Other Adjustment: Invest.Interest – Invest Income			
(1) Adjustment	0		
(2) As Reported	19,889		
(3) Corrected	19,889	0	0

Remarks:

Form 870-P(AD) (5-88) Date: 12-20-96	Department of the Treasury Internal Revenue Service Settlement Agreement For Partnership Adjustments	In Reply Refer To: MS 4550 122096-0927

Taxpayer(s) Name(s) and Address	Name of Partnership
Kenneth C Keener	Agri-Venture Fund
XXXXXXXXX Drive	
Austin, TX XXXXX	TIN: 33-0115708
TIN: XXXX-XXX-XXXX	Tax Year Ended: 1985

Under the provisions of section 6224(c) of the Internal Revenue Code, the undersigned offers to enter into a settlement agreement with respect to the determination of partnership items of the partnership for the year shown on the attached schedule of adjustments. The undersigned, in accordance with the provisions of section 6224(b) of the code, also offers to waive the restrictions on the assessment and collection of any deficiency attributable to partnership items (with interest as required by law) provided in section 6225(a).

This offer is subject to acceptance for the commissioner of the internal revenue service. It will take effect as a waiver of restrictions on the date it is accepted. Unless and until it is accepted, it will have no force or effect.

If this offer is accepted for the commissioner, the treatment of partnership items under this agreement will not be reopened in the absence of fraud, malfeasance, or misrepresentation of fact; and no partnership items may be filed or prosecuted.

Signature of Taxpayer	Date
/s/ Kenneth C. Keener	3-21-97
Signature of Taxpayer	Date
By (Signature and Title)	Date

If this offer is executed by a tax matters partner, please include title with the signature.

Note: the execution and filing of this offer will expedite the adjustment of tax liability.

If this offer is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, unless one spouse, acting under a power of attorney, signs as agent for the other.

If the taxpayer is a corporation, the offer must be signed with the corporate name followed by the signature and title of the officer authorized to sign.

This offer may be executed by the taxpayer's attorney or agent provided this action is specifically authorized by a power of attorney, which, if not previously filed, must accompany this form.

The submission of this offer by you and the acceptance of the offer for the commissioner may result in an additional tax liability to you plus interest as provided by law. If the result is a decrease in tax, the amount of the decrease will be sent to you with interest as provided by law.

	DATE ACCEPTED FOR COMMISSIONER	SIGNATURE
FOR INTERNAL REVENUE USE ONLY	28 APR 1997 OFFICE	/s/ Larry Pagna [*sic.*] TITLE Associate Chief

SALT LAKE CITY APPEALS OFFICE FORM 870-P(AD) (5-88)

Stamped: RECEIVED ESU APR-3 1997 OGDEN SERVICE CENTER

Settlement Agreement For Partnership Adjustments

Name of Partnership AGRI-VENTURE FUND Taxpayer Identification Number: 33-0053999	Schedule of Adjustments Tax Year(s) Ended December 31, 1985		
Detail of Adjustments to Ordinary Income			
Schedule F – Farming Expenses	11,806,681		
Other Deductions	218,477		
Rental Expenses/Depreciation	0		
Ordinary Income/Loss from Partnership	0	*	
Total Adjustments to Ordinary Income	12,025,158	0	0
Other Adjustment: T.P.I. – Qualified Investment Expense			
(1) Adjustment	(18,894,809)		
(2) As Reported	28,201,208		
(3) Corrected	9,306,399	0	0
Other Adjustment: T.P.I. – Qualified Investment Income			
(1) Adjustment	0		
(2) As Reported	33,154		
(3) Corrected	33,154	0	0
Other Adjustment: Invest.Interest – Invest.Income			
(1) Adjustment	0		
(2) As Reported	16,093		
(3) Corrected	16,093	0	0

Remarks:

* The tax treatment of the partnership items relating to Pump Station III Joint Venture, Agri-Venture Farming Joint Venture, Columbia Basin Growers, Desert Highland Vineyards, Houston Farm Associates II, Indo Date Associates and USB-85 Associates, will be resolved in separate partnership proceedings conducted in accordance with the TEFRA partnership procedures. The adjustments made in those partnership proceedings will be treated as computational adjustments and be assess, credited or refunded accordingly.

Continuation of Schedule of Adjustments

Settlement Agreement For Partnership Adjustments

	Schedule of Adjustments		
Name of Partnership AGRI-VENTURE FUND Taxpayer Identification Number: 33-0053999	Tax Year(s) Ended December 31, 1985		
Other Adjustment: Investment Credit Prop. – New/3 year			
(1) Adjustment	0		
(2) As Reported	182,279		
(3) Corrected	182,279	0	0
Other Adjustment: Invest. Credit Prop. – New/Other			
(1) Adjustment	0		
(2) As Reported	2,418,496		
(3) Corrected	2,418,496	0	0
Other Adjustment. Invest. Credit Prop. – Used/Other			
(1) Adjustment	0		
(2) As Reported	14,974		
(3) Corrected	14,974	0	0

Remarks:

Form 870-P(AD) (5-88) Date: 12-20-96	Department of the Treasury Internal Revenue Service Settlement Agreement For Partnership Adjustments	In Reply Refer To: MS 4550 122096-1618

Taxpayer(s) Name(s) and Address	Name of Partnership
William P., Jr. and Anne D. Smith	Richgrove Grape Associates
XXXXXXXXXX Blvd.	
Bartlesville, OK XXXXX	TIN: 33-0053994
TIN: XXXX / XXXX	Tax Year Ended: 1984

Under the provisions of section 6224(c) of the Internal Revenue Code, the undersigned offers to enter into a settlement agreement with respect to the determination of partnership items of the partnership for the year shown on the attached schedule of adjustments. The undersigned, in accordance with the provisions of section 6224(b) of the code, also offers to waive the restrictions on the assessment and collection of any deficiency attributable to partnership items (with interest as required by law) provided in section 6225(a).

This offer is subject to acceptance for the commissioner of the internal revenue service. It will take effect as a waiver of restrictions on the date it is accepted. Unless and until it is accepted, it will have no force or effect.

If this offer is accepted for the commissioner, the treatment of partnership items under this agreement will not be reopened in the absence of fraud, malfeasance, or misrepresentation of fact; and no partnership items may be filed or prosecuted.

Signature of Taxpayer	Date
/s/ Wm Smith	Feb. 1, 1999
Signature of Taxpayer	Date
/s/ Anne D. Smith	Feb. 1, 1999
By (Signature and Title)	Date

CONSISTENT AGREEMENT

If this offer is executed by a tax matters partner, please include

title with the signature.

Note: the execution and filing of this offer will expedite the adjustment of tax liability.

If this offer is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, unless one spouse, acting under a power of attorney, signs as agent for the other.

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The submission of this offer by you and the acceptance of the offer for the commissioner may result in an additional tax liability to you plus interest as provided by law. If the result is a decrease in tax, the amount of the decrease will be sent to you with interest as provided by law.

	DATE ACCEPTED FOR COMMISSIONER	SIGNATURE
FOR INTERNAL REVENUE USE ONLY	APR 09 1999	/s/ Jerry Gossett [*sic.*]
	OFFICE	TITLE Associate Chief, Appeals

So. Calif. Appeals FORM 870-P(AD) (5-88)

Settlement Agreement For Partnership Adjustments

	Schedule of Adjustments		
Name of Partnership RICHGROVE GRAPE ASSOCIATES Taxpayer Identification Number: 33-0053999	Tax Year(s) Ended December 31, 1984		
Detail of Adjustments to Ordinary Income			
Schedule F – Farming Expenses	1,841,599		
Other Deductions	46,757		
Total Adjustments to Ordinary Income	1,888,356	0	0
Other Adjustment. T.P.I. – Qualified Investment Expense			
(1) Adjustment	(3,048,599)		
(2) As Reported	4,839,046		
(3) Corrected	1,790,447	0	0
Other Adjustment: T.P.I. – Qualified Investment Income			
(1) Adjustment	0		
(2) As Reported	8,668		
(3) Corrected	8,668	0	0
Other Adjustment: Invest.Interest - Invest.Income			
(1) Adjustment	0		
(2) As Reported	8,668		
(3) Corrected	8,668	0	0

Remarks:

Form 870-P(AD) (5-88) Date: 12-20-96	Department of the Treasury Internal Revenue Service Settlement Agreement For Partnership Adjustments	In Reply Refer To: MS 4550 122096-1618

Taxpayer(s) Name(s) and Address	Name of Partnership
William P., Jr. and Anne D. Smith	Desert Highland Vineyards
XXXXXXXXXX Blvd.	
Bartlesville, OK XXXXX	TIN: 33-0121107
TIN: XXXX / XXXX	Tax Year Ended: 1985

Under the provisions of section 6224(c) of the Internal Revenue Code, the undersigned offers to enter into a settlement agreement with respect to the determination of partnership items of the partnership for the year shown on the attached schedule of adjustments. The undersigned, in accordance with the provisions of section 6224(b) of the code, also offers to waive the restrictions on the assessment and collection of any deficiency attributable to partnership items (with interest as required by law) provided in section 6225(a).

This offer is subject to acceptance for the commissioner of the internal revenue service. It will take effect as a waiver of restrictions on the date it is accepted. Unless and until it is accepted, it will have no force or effect.

If this offer is accepted for the commissioner, the treatment of partnership items under this agreement will not be reopened in the absence of fraud, malfeasance, or misrepresentation of fact; and no partnership items may be filed or prosecuted.

Signature of Taxpayer	Date
/s/ Wm Smith	Feb. 1, 1999
Signature of Taxpayer	Date
/s/ Anne D. Smith	Feb. 1, 1999
By (Signature and Title)	Date

CONSISTENT AGREEMENT

If this offer is executed by a tax matters partner, please include

title with the signature.

Note: the execution and filing of this offer will expedite the adjustment of tax liability.

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	DATE ACCEPTED FOR COMMISSIONER	SIGNATURE
FOR INTERNAL REVENUE USE ONLY	APR 09 1999	/s/ Jerry Gossett [*sic.*]
	OFFICE	TITLE Associate Chief, Appeals

So. Calif. Appeals FORM 870-P(AD) (5-88)

Settlement Agreement For Partnership Adjustments

Name of Partnership RICHGROVE GRAPE ASSOCIATES Taxpayer Identification Number: 33-0053999	Schedule of Adjustments Tax Year(s) Ended December 31, 1984		
Detail of Adjustments to Ordinary Income			
Schedule F – Farm Loss	1,423,734		
Other Deductions	34,822		
Total Adjustments to Ordinary Income	1,462,556	0	0
Other Adjustment: T.P.I. – Qualified Investment Expense			
(1) Adjustment	(2,301,063)		
(2) As Reported	3,434,422		
(3) Corrected	1,133,359	0	0
Other Adjustment: T.P.I. – Qualified Investment Income			
(1) Adjustment	0		
(2) As Reported	3,745		
(3) Corrected	3,745	0	0
Other Adjustment: Invest.Interest – Invest.Income			
(1) Adjustment	0		
(2) As Reported	3,745		
(3) Corrected	3,745	0	0
Other Adjustment: Investment Credit Property – Used/Other			
(1) Adjustment	0		
(2) As Reported	125,000		
(3) Corrected	125,000	0	0

Remarks: